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13

14 **UNITED STATES BANKRUPTCY COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 In re:)	Case No. 11-31376-DM
)	
18 HOWREY LLP,)	Chapter 11
)	
19 A District of Columbia Limited Liability)	Date: June 8, 2011
Partnership,)	Time: 9:30 a.m.
)	Dept: U.S. Bankruptcy Court
20 Debtor(s).)	235 Pine Street, 22nd Floor
)	San Francisco, CA
21 1299 Pennsylvania Avenue)	Judge: Honorable Dennis Montali
22 Washington D.C., 20004)	
)	
23 <u>Employer's Tax I.D. No: 53-0231650</u>)	

24
25 **MOTION OF THE DEBTOR FOR ORDER (A) AUTHORIZING CONTINUED USE OF CASH**
26 **MANAGEMENT SYSTEM; AND (B) AUTHORIZING CONTINUED USE OF THE DEBTOR'S EXISTING**
BANK ACCOUNTS AND BUSINESS FORMS
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1 **TO: THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY JUDGE, THE OFFICE**
2 **OF THE UNITED STATES TRUSTEE, THE DEBTOR'S TWENTY LARGEST UNSECURED**
3 **CREDITORS, THE DEBTOR'S SECURED LENDERS, THE PETITIONING CREDITORS AND**
4 **OTHER PARTIES IN INTEREST:**

5 Howrey LLP, the debtor and debtor-in-possession in the above-captioned case (the "Debtor")
6 hereby moves (the "Motion") this Court for entry of an order (the "Order"), substantially in the form
7 attached hereto as **Exhibit "A"**, pursuant to Sections 105(a), 345, and 363 of Title 11 of the United
8 States Code (the "Bankruptcy Code") and Rules 6003 and 6004 of the Federal Rules of Bankruptcy
9 Procedure (the "Bankruptcy Rules"), (i) authorizing the continued use of the Debtor's existing cash
10 management system and procedures (the "Cash Management System"); and (ii) authorizing the
11 maintenance and continued use of the Debtor's existing bank accounts, checks and business forms.
12 This Motion is based on the DECLARATION OF ROBERT RUYAK IN SUPPORT OF FIRST DAY MOTIONS
13 (the "First Day Declaration"), filed concurrently herewith, which is fully incorporated herein by
14 reference.¹

15 The Debtor is in the process of winding down its business and affairs. Among the Debtor's
16 assets are approximately \$63 million in accounts receivable. The Debtor operates under a cash
17 management system in the ordinary course of business which is designed to accurately and
18 efficiently collect, transfer and disburse funds generated by the Debtor and to record each deposit,
19 transfer, and disbursement made by the Debtor. It is critical that the Debtor's collection efforts
20 continue uninterrupted and without any confusion that would result from closing existing accounts
21 and otherwise modifying the Debtor's cash management system, so that receipts are not lost,
22 misapplied or otherwise delayed. Accordingly, the Court should authorize the Debtor to maintain its
23 current cash management system and waive any contrary requirements of the Bankruptcy Code,
24 Bankruptcy Rules and United States Trustee Guidelines.

25 In support of the Motion, the Debtor respectfully represents the following:

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28 ¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration.

1 **JURISDICTION AND VENUE**

2 1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334.
3 This is a core proceeding under 28 U.S.C. § 157(b). The Debtor has filed a motion seeking to
4 transfer the venue of this case, which is currently pending before the Court. By filing this Motion,
5 the Debtor is not consenting to venue in this Court and expressly reserves its arguments that venue in
6 this Court is both improper and inconvenient. No request for the appointment of a trustee or
7 examiner has been made in this case, and no statutory official committees have been appointed or
8 designated by the Office of the United States Trustee.

9 2. The statutory bases for the relief requested herein are Sections 105(a), 345, and 363
10 of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004.

11 **BACKGROUND**

12 3. On April 11, 2011 (the "Petition Date"), certain alleged creditors of the Debtor filed
13 an involuntary petition for relief under chapter 7 of the Bankruptcy Code. Following the Petition
14 Date, through the date of entry of an Order for Relief, the Debtor continued to operate its business in
15 accordance with § 303(f) of the Bankruptcy Code.

16 4. The Debtor is a limited liability partnership organized under the laws of the District
17 of Columbia, and was founded in 1956. A further description of the Debtor's business, and certain
18 facts supporting the relief sought through this Motion are set forth in the First Day Declaration.

19 **BASIS FOR RELIEF**

20 **A. Request for Authority to Continue Using the Debtor's Existing Cash Management System**

21 5. The Debtor, by this Motion, seeks to continue to use the Cash Management System
22 after the entry of the Order for Relief in the ordinary course of the Debtor's business for the benefit
23 of all parties in interest in the case.

24 6. The Debtor operates its Cash Management System in the ordinary course of its
25 business. The Cash Management System is designed to accurately and efficiently collect, transfer
26 and disburse funds generated by the Debtor and to record each deposit, transfer, and disbursement
27 made by the Debtor. The Cash Management System enables the Debtor to (i) better forecast and
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1 report its cash position, (ii) monitor collection and disbursement of funds and (iii) maintain control
2 over the administration of their various bank accounts, all of which facilitates effective collection,
3 disbursement and movement of cash.

4 7. The Debtor maintains 25 active bank accounts which are all linked to the Cash
5 Management System (the "Bank Accounts"). Fourteen of these accounts are maintained in the
6 United States, including twelve accounts at Citibank, N.A., one account at Northern Trust Bank of
7 Texas and one account at Wells Fargo Bank, N.A. In addition, the Debtor maintains eleven
8 international accounts, including four accounts at Fortis Banque S.A./N.V., three accounts at ABN
9 AMRO Bank N.V., and four accounts at Deutsche Bank Attached hereto as **Exhibit "B"** is a list of
10 the Bank Accounts maintained by the Debtor. A schematic of the Debtor's Cash Management
11 System is attached hereto as **Exhibit "C"** (the "Schematic"). As shown in the Schematic, the
12 Debtor's Cash Management System is built upon a main depository account for each country in
13 which the Debtor operates and the Debtor's cash is consolidated for use in its operations in the
14 respective countries.

15 8. The depository account (the "Domestic Depository") maintained by Citibank, N.A.
16 ("Citibank") in Washington D.C. serves as the sole depository account for all domestic operations.
17 The Domestic Depository is funded by deposits of accounts receivables from clients in the form of
18 both checks and wires.

19 9. Disbursements on account of the Debtor's domestic general operating expenses are
20 transferred from the Domestic Depository to a disbursement account held at Citibank for payment to
21 creditors or employees of the Debtor.

22 10. Disbursements on account of the Debtor's domestic payroll and related obligations
23 are transferred from the Domestic Depository to a payroll account held at Citibank through which
24 payroll and payroll related payments are made by the Debtor to its employees.

25 11. Howrey maintains an imprest account at Citibank in Washington, D.C. for the
26 funding of self insurance claims administered by CIGNA.

1 12. An additional account is held at Citibank in Washington, D.C. for administration of a
2 terminated defined benefits plan. There are currently zero funds in that account and it is in the
3 process of being closed.

4 13. Howrey maintains additional depository accounts (the “Foreign Depositories”) in
5 each of the foreign countries it operates including a depository account in the Netherlands (the
6 “Amsterdam Depository”) maintained by ABN AMRO Bank N.V. (“ABN AMRO”) in Rotterdam; a
7 depository account in Belgium (the “Brussels Depository”) maintained by Fortis Banque S.A/N.V.
8 (“Fortis”) in Brussels; and a depository account in Germany (the “Munich Depository”) maintained
9 by Deutsche Bank in Munich. Disbursements on account of the Debtor’s foreign general operating
10 expenses are transferred from the respective Foreign Depositories to a disbursement account (at the
11 same bank) in each of the countries for payment to creditors or employees of the Debtor.

12 14. In addition, Howrey maintains two foreign payroll accounts at each of Fortis (in
13 Brussels, Belgium for Brussels payroll expenses); and Deutsche Bank (in Munich, Germany for
14 Munich payroll expenses), through which payroll and payroll related payments were made by the
15 Debtor to its employees in those offices. Foreign regulations prevent the Debtor from closing these
16 accounts at this time.

17 15. Howrey maintains an additional operating account at Citibank in New York, NY to
18 manage its swap agreement with Citibank. The Capital Markets Holding account is a hedge account
19 used to mark the swap to market. The operating account is used to pay Citibank interest on the swap
20 agreement.

21 16. Howrey maintains six domestic and three foreign escrow accounts. These accounts
22 hold client funds in trust and are separate from the funds belonging to Howrey.

23 17. Howrey is also responsible for the administration of a class action settlement and
24 holds an account with Citibank in New York, NY to disburse the proceeds of the settlement.

25 18. The Debtor’s cash management procedures constitute ordinary course, essential
26 business practices for the Debtor. The Debtor’s current Bank Accounts provide significant benefits
27 to the Debtor including, inter alia, the ability to (i) ensure that clients are able to deposit funds in
28 accordance with prior instructions; (ii) ensure the maximum availability of funds when necessary,

1 and (iii) reduce administrative expenses by facilitating the movement of funds and the development
2 of timely and accurate account balance information. The Debtor submits that any serious disruption
3 to its Cash Management System and existing Bank Accounts could have a severe and adverse impact
4 upon its efforts to collect accounts receivable and otherwise maximize value.

5 19. Moreover, the Debtor intends to take reasonable steps to ensure that maintaining the
6 present system, subject to any modifications discussed above, will not result in any prejudice to any
7 party in interest. The Debtor will separately record, as of the entry of the Order for Relief, the
8 consolidated balances of each of its Bank Accounts so as to distinguish those transfers and ensure
9 that such transactions are adequately and promptly documented in their books and records.

10 20. A debtor's request to maintain its existing Cash Management System has been held to
11 be entirely consistent with Section 363(c)(1) of the Bankruptcy Code, "which allows a debtor in
12 possession to use property of the estate in the ordinary course of business." See Charter Co. v.
13 Prudential Ins. Co. of America (In re Charter Co.), 778 F.2d 617, 621 (11th Cir. 1985). As courts
14 have held, an integrated cash management system "allows efficient utilization of cash resources and
15 recognizes the impracticalities of maintaining separate cash accounts for the many different purposes
16 that require cash." In re Columbia Gas Sys., Inc., 136 B.R. 930, 934 (Bankr. D. Del. 1992), *aff'd in*
17 *relevant part and rev'd in part*, 997 F.2d 1039, 1061 (3d Cir. 1993). The requirement to maintain all
18 accounts separately "would be a huge administrative burden and economically inefficient." Id. at
19 1061; see also In re Southmark Corp., 49 F.3d 1111, 1114 (5th Cir. 1995) (stating that cash
20 management system allows debtor "to administer more efficiently and effectively its financial
21 operations and assets"). In addition, § 105(a) of the Bankruptcy Code authorizes the Court to "issue
22 any order, process or judgment that is necessary or appropriate to carry out the provisions of this
23 title." 11 U.S.C. § 105(a). Therefore, the Court may grant the relief requested in the exercise of its
24 equitable powers.

25 **B. Request for Authority to Maintain Existing Bank Accounts and Business Forms**

26 21. The U.S. Trustee Guidelines were adopted in order to assist the U.S. Trustee in
27 supervising the administration of chapter 11 cases. The U.S. Trustee Guidelines require chapter 11
28 debtors to, among other things:

- 1 (a) close all existing bank accounts and open new accounts which must be
2 designated debtor in possession bank accounts; and
- 3 (b) establish and maintain a separate debtor-in-possession general account, for
4 receipt of all revenues and all other income received by the debtors, payroll
5 account, to fund all payroll expenses, and tax account, for the payment of
6 taxes.

7 22. The U.S. Trustee Guidelines are designed to distinguish between prepetition and
8 postpetition transactions and to prevent the inadvertent payment of prepetition claims.
9 Notwithstanding these requirements, the continued use of the Bank Accounts is essential to a smooth
10 and orderly transition into chapter 11. All parties in interest will be best served by the Debtor's
11 continued use of the Bank Accounts, as it will minimize the disruption of the Debtor's efforts to
12 wind down its operations. As such, the Debtor seeks a waiver of the U.S. Trustee requirement that
13 its Bank Accounts be closed and that new postpetition bank accounts be opened. The Debtor further
14 requests that the Bank Accounts be deemed debtor-in-possession accounts and that the Debtor be
15 authorized to maintain and continue using these accounts in the same manner and with the same
16 accounts numbers, styles and document forms as those employed during the prepetition period.

17 23. In addition, the Debtor hereby seeks a waiver of the requirement to establish specific
18 bank accounts for tax payments and payroll expenses. The Debtor believes that (a) the Debtor's tax
19 obligations and payroll obligations can be funded most efficiently out of the existing Bank Accounts,
20 (b) the U.S. Trustee can adequately monitor the flow of funds into, between, and out of such
21 accounts, and (c) the creation of new debtor-in-possession accounts designated solely for tax
22 obligations and payroll obligations would be unnecessary and inefficient.

23 24. Accordingly, subject to a prohibition against honoring checks issued prior to the entry
24 of the Order for Relief without specific authorization from this Court permitting the honoring of
25 such checks, the Debtor requests that the Bank Accounts be deemed to be debtor-in-possession
26 accounts and that their continued use, in the same manner employed immediately preceding the
27 entry of the Order for Relief be authorized.

1 25. The Debtor represents that if the relief requested in this Motion is granted, it will not
2 pay, and each of its banks will be directed not to pay, any debts incurred before the entry of the
3 Order for Relief, other than as authorized by orders of this Court.

4 26. In an effort to minimize administrative expense and delay, the Debtor requests
5 authority to continue to use its correspondence, business forms, including, but not limited to,
6 letterhead, purchase orders, invoices, and checks (collectively, the "Business Forms") in the forms
7 existing immediately prior to the entry of the Order for Relief, without reference to its status as a
8 debtor-in-possession.

9 27. In addition to press releases, each of the Debtor's significant vendors will receive
10 direct notice of these bankruptcy filings. Furthermore, changing the Business Forms would be
11 expensive and burdensome to the Debtor's wind down efforts while conferring no benefit to those
12 dealing with the Debtor. For these reasons, the Debtor seeks authorization to use existing Business
13 Forms without being required to place the label "Debtor-in-Possession" on each.

14 **C. Bankruptcy Rule 6003 Does Not Apply.**

15 28. The relief requested is also warranted under Bankruptcy Rule 6003, which provides:

16
17 Except to the extent that relief is necessary to avoid immediate and irreparable
18 harm, the court shall not, within 21 days after the filing of the petition, grant
19 relief regarding the following: . . . (b) a motion to use, sell, lease, or otherwise
incur an obligation regarding property of the estate, including a motion to pay
all or part of a claim that arose before the filing of the petition, but not a
motion under Rule 4001. Fed. R. Bankr. P. 6003.

20 29. This Motion was filed more than 21 days following the Petition Date. Accordingly,
21 the restrictions set forth in Rule 6003 do not apply to the Motion. Moreover, to the extent that the
22 requirements of Bankruptcy Rule 6003 are applicable to the relief requested in the Motion, the
23 Debtor submits that for the reasons already set forth herein, the relief requested in this Motion is
24 necessary to avoid immediate and irreparable harm.

25 30. Accordingly, the Court should allow for the continued use of the Debtor's Cash
26 Management System and maintenance of its existing Bank Accounts.
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1 **D. Waiver of § 345 Investment Requirements.**

2 31. Bankruptcy Code Section 345 authorizes deposits or investments of money of a
3 bankruptcy estate, such as cash, in a manner that will “yield the maximum reasonable net return on
4 such money, taking into account the safety of such deposit or investment.” 11 U.S.C. § 345(a).
5 Local Bankruptcy Rule 2015-1(b) provides that “[t]here shall be a rebuttable presumption that funds
6 which are deposited with an entity which is included on the United States Trustee’s most recent list
7 of ‘cooperating depositories’ have been deposited in accordance with 11 U.S.C. § 345(b).” Local
8 Bankruptcy Rule 2015-1(b). Certain of the Debtor’s banks are not listed as “cooperating
9 depositories.”

10 32. By this Motion, the Debtor also seeks a waiver of the investment and deposit
11 requirements imposed by Bankruptcy Code Section 345(b). Bankruptcy Code Section 345
12 authorizes deposits or investments of money of a bankruptcy estate, such as cash, in a manner that
13 will “yield the maximum reasonable net return on such money, taking into account the safety of such
14 deposit or investment.” 11 U.S.C. § 345(a).

15 33. For deposits or investments that are not “insured or guaranteed by the United States
16 or by a department, agency, or instrumentality of the United States or backed by the full faith and
17 credit of the United States,” Section 345(b) provides that the estate must require from the entity with
18 which the money is deposited or invested a bond in favor of the United States secured by the
19 undertaking of an adequate corporate surety, “unless the court for cause orders otherwise.” 11
20 U.S.C. § 345(b).

21 34. The Debtor believes that “cause” exists to waive the investment and deposit
22 restrictions pursuant to Bankruptcy Code Section 345(b).

23 35. Courts have considered a number of factors in seeking to determine whether “cause”
24 exists pursuant to Bankruptcy Code Section 345(b). See In re Service Merch. Co., 240 B.R. 894,
25 896 (Bankr. M.D. Tenn. 1999) (identifying various factors relevant to the existence of “cause,”
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1 including the sophistication and size of the debtor's business, the amounts of the investments
2 involved, bank ratings, the complexity of the case, the debtor's safeguards for the funds, the debtor's
3 ability to reorganize in the face of failure of one or more of the financial institutions, the benefit to
4 the debtor of a waiver of the Section 345(b) requirements, the potential harm to the estate, and the
5 reasonableness of such a waiver under the circumstances).

7 36. Congress has emphasized that the investment and deposit requirements set forth in
8 Bankruptcy Code Section 345 may be "wise in the case of a smaller debtor with limited funds that
9 cannot afford a risky investment to be lost, [but such requirements] can work to needlessly handcuff
10 larger, more sophisticated debtors." H.R. Rep. 103-834, 103d Cong., 2d Sess. 224 (Oct. 4, 1994);
11 140 Cong. Rec. H10767 (Oct. 4, 1994). Thus, Congress added the waiver clause in Section 345(b)
12 "to allow the courts to approve investments other than those permitted by Section 345(b) for just
13 cause, thereby overruling In re Columbia Gas Sys., Inc., 33 F.3d 294, 1994 WL 463514 (3d Cir. Del.
14 1994)." Id.

16 37. To the extent that any account has a balance substantial enough to fall within the
17 ambit of § 345, the Debtor believes that the safety presented by the financially stable, banking
18 institutions with whom the Debtor banks constitutes sufficient cause pursuant to allow the Debtor to
19 deviate from approved investment and deposit practices established by the Bankruptcy Code. The
20 Debtor submits that "cause" exists pursuant to Section 345(b) of the Bankruptcy Code to waive this
21 requirement because, among other considerations, (i) the Debtor's banks are highly-rated and
22 regulated banks, (ii) the Debtor retains the right to remove funds and establish new bank accounts as
23 needed, (iii) the cost associated with satisfying the requirements of § 345 of the Bankruptcy Code is
24 burdensome and (iv) the process of satisfying those requirements would lead to needless
25 inefficiencies in the management of the Debtor's business. Moreover, strict compliance with the
26 requirements of § 345 of the Bankruptcy Code would not be practical in this case. A bond secured
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1 by the undertaking of a corporate surety would be prohibitively expensive, if such bond is available
2 at all. Given the relative security of the Debtor's Cash Management System, the Debtor submits that
3 cause exists to grant a waiver of the requirements of § 345(b) of the Bankruptcy Code. Accordingly,
4 the Debtor respectfully requests authority to maintain their Bank Accounts in a safe and prudent
5 manner in accordance with their existing banking practices.
6

7 **WAIVER OF BANKRUPTCY RULES 6004(A) AND 6004(H)**

8 38. To implement the foregoing successfully, the Debtor seek a waiver of the notice
9 requirements under Bankruptcy Rule 6004(a) and, to the extent it may apply, the fourteen (14) day
10 stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).
11

12 **NOTICE**

13 39. The Debtor has provided notice of this Motion to: (a) the Office of the United States
14 Trustee, (b) the creditors listed on the Debtor's list of 20 largest unsecured creditors, (c) counsel to
15 the administrative agent for the lenders under the Debtor's prepetition credit facility, (d) the Internal
16 Revenue Service, (e) the Department of Justice, (f) counsel to the petitioning creditors, (g) all parties
17 that have filed a Request for Notice in this case; and (h) the Debtor's banks listed on Exhibit B. In
18 light of the nature of the relief requested, the Debtor submits that no further notice is required or
19 needed under the circumstances.

20 **NO PRIOR APPLICATION**

21 40. No previous request for the relief sought herein has been made to this Court or any
22 other court.

23 **CONCLUSION**

24 WHEREFORE, the Debtor respectfully requests that this Court grant this Motion and enter
25 the proposed Order,
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1. Authorizing the continued use of the Debtor's Cash Management System;
2. Authorizing the maintenance and continued use of the Debtor's existing Bank Accounts and Business Forms; and
3. Granting such other and further relief as this Court deems appropriate.

Dated: June 6, 2011

WILEY REIN LLP
H. Jason Gold
Valerie P. Morrison
Dylan G. Trache

and

MURRAY & MURRAY

By: /s/ Robert A. Franklin
Robert A. Franklin
Counsel to Howrey LLP